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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 970

FEDERAL TRADE COMMISSION,
Petitioner,

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT BOWFUND CORPORATION

QUESTIONS PRESENTED

1. Whether the "all writs" statute, 28 U.S.C. 1651(a), authorizes the issuance of a preliminary injunction in favor of the Federal Trade Commission as an "aid" to the potential review jurisdiction of the court of appeals which may only be invoked by a respondent.

2. Whether, in any event, there is jurisdiction in the court of appeals to issue an injunction against Bowman in the absence of a showing that such a writ is necessary to preserve the possibility of an effective administrative remedy.

STATEMENT

Responsibility for enforcement of Section 7 of the Clayton Act has been shared by the Federal Trade Commission and the Department of Justice since the enactment of the statute in 1914. By means of informal arrangements, such as the Memorandum of Agreement made in June of 1948, the two branches of the Government have coordinated their enforcement activities.[1] Both the Commission and the Department are advised when any new investigation is commenced by either, and, if appropriate, "the question of which agency should proceed is submitted to a joint conference." Report of the Attorney General's National Committee to Study the Antitrust Laws, 376.

On November 2, 1965, counsel for Dean Foods Company ("Dean") advised the Commission that Dean planned to acquire the operating assets of Bowman Dairy Company ("Bowman"). (R. 150) An investigation was promptly initiated and relevant data was voluntarily supplied to the Commission. On December 13, 1965, a purchase agreement was executed providing for the sale of Bowman's operating assets to Dean for a fraction of their book value.[2] The Commission was notified the next day. (R. 152).

Before the agreement was performed, and prior to the acquisition by Dean of any of Bowman's assets, the Commission issued its administrative complaint under Section 11(b) of the Federal Trade Commission Act. The com-

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[1] When the facts warrant, the Commission and the Department of Justice may proceed simultaneously. See *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683, 694-5 (1948).

[2] Assets having a book value as of June 30, 1965, of $19,096,851 were sold for $12,438,384; eliminating receivables and prepaid expenses, fixed assets with a book value of $10,308,546 were sold for $3,750,079. (R. 159)

plaint alleged that ". . . respondents have violated Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act." (R. 7) The complaint contained no prayer for relief. (R. 14).

The litigation which is now before this Court was commenced on December 30, 1965, by filing in the court of appeals an Emergency Petition for a preliminary injunction and other relief. (R. 1) Before commencing this proceeding, counsel for the Commission conferred with the Department of Justice and decided that this matter would provide an appropriate vehicle to test out the jurisdictional issue which is now before this Court.[3]

The Attorney General has not instituted any proceedings in the District Court pursuant to Section 15 of the Clayton Act. The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice has, however, appeared in this Court as counsel for the Commission.

On January 19, 1966, the court of appeals dismissed the Emergency Petition and dissolved the temporary restraining order which it had previously entered. It held that Congress had not authorized the Commission to apply to that court for the relief requested. (R. 153-4).

Thereafter, the acquisition was consummated, Dean acquired Bowman's operating assets, and Bowman received and invested the proceeds of sale. (R. 157).

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[3] In oral argument before the court of appeals the attorney for the Commission expressly acknowledged that the Commission "conferred with the Department of Justice before bringing this case," (R. 97) and that the case had been instituted "to test out an important jurisdictional issue." (R. 92)

ARGUMENT

I.

THERE IS NO SHOWING THAT THE RELIEF REQUESTED COULD NOT BE OBTAINED WITHOUT RESORT TO THE WRIT.

It has been repeatedly held that the availability of an adequate alternative remedy, which has not been exhausted by the applicant, forecloses the use of an extraordinary writ. Whatever may be done without the writ, may not be done with it. *Ex parte Fahey,* 332 U.S. 258, 259-260; *Bankers Life & Casualty Company* v. *Holland,* 346 U.S. 379, 383; *Ex parte Rowland,* 104 U.S. 604, 617.

Accordingly, in order to invoke the extraordinary remedy which historically has been reserved for truly exceptional cases, applicant has the burden of satisfying the Court that its interests may not be protected without resort to the writ. The Commission has not discharged that burden in this litigation.

There has been no showing that the prelitigation conferences between the Commission and the Department of Justice justified the conclusion that no relief could have been obtained from the District Court to protect the interests of the Commission. On the contrary, the inference is plain that there was a joint decision *not* to proceed in the District Court pursuant to Section 15 of the Clayton Act, but rather to cooperate in the bringing of a test case to determine whether the Commission's enforcement authority under Section 11 of the Clayton Act could be supplemented by resort to the "all writs" act.

The court of appeals wisely held that Congress had not authorized the Commission to proceed in this manner.

Since there has been no showing that the statutory remedies specifically provided by Congress for enforce-

ment of Section 7 were inadequate, but it merely appears that the Commission (and presumably the Department of Justice, as well) would like to supplement these remedies, resort to the writ is wholly unwarranted.

II.

THE EMERGENCY PETITION DID NOT SEEK RELIEF IN AID OF THE JURISDICTION OF THE COURT OF APPEALS WITHIN THE MEANING OF SECTION 1651(a).

Ostensibly this proceeding was instituted in aid of the potential jurisdiction of the court of appeals. The potential jurisdiction to which reference is made is the review procedure which only respondents may invoke in order to obtain judicial protection from arbitrary or erroneous agency action. The Commission has no right to invoke the jurisdiction of the court of appeals at any stage of the proceeding.[4] The Emergency Petition filed in the court of appeals cannot fairly be characterized as "in aid of" the court's review jurisdiction which may only be invoked by the private citizen.

The petition for a preliminary injunction does not fit either the language or the purpose of the "all writs" act.

III.

BOWMAN IS NOT A NECESSARY PARTY TO THIS PROCEEDING; ACCORDINGLY, IN NO EVENT SHOULD A WRIT ISSUE AGAINST IT.

The Commission argues that the "all writs" act may be invoked because an injunction is necessary to preserve the

[4] Prior to the 1959 amendment to the Clayton Act, the Commission was authorized to petition the court of appeals for enforcement of a divestiture order. That authority was removed by the so-called Clayton Finality Act, 73 Stat. 243.

possibility of an effective administrative remedy. (Br. 15) We believe this argument is entirely without merit. But even if it were valid, the argument has no application whatsoever to Bowman in this proceeding.

A former Solicitor General has correctly advised this Court that a company whose assets have been acquired is not a necessary party to litigation challenging the legality of the acquisition under Section 7 of the Clayton Act. See Brief for the United States in Opposition to Motion to Dismiss in *United States* v. *Continental Oil Company*, No. 834, October Term 1963. The violation, if any, is committed by the acquiring company, not the seller.

Moreover, the arguments advanced by the Commission in favor of some kind of interim relief are completely inapplicable to the selling company. Bowman has parted with control over its operating assets. Even if it be assumed that the Commission can justify an order preventing Dean from effecting changes which will produce profits instead of losses in Chicago, that objective can be obtained without directing any writ against Bowman.

Never before has the Commission obtained any relief of any kind against the company whose stock or assets were acquired in violation, or alleged violation, of Section 7. There is no reason why such novel relief should be granted in this case. Certainly Section 1651(a) should not be used as a vehicle for authorizing relief against a party who would not normally even be named as a respondent to the administrative proceeding. It is neither necessary nor appropriate to authorize the issuance of any writ against Bowman in this case.

CONCLUSION

For the foregoing reasons, together with the additional reasons set forth in the Brief in Opposition to the Petition for Certiorari submitted on behalf of Bowfund Corporation, it is respectfully submitted that the order of the court of appeals should be affirmed or, in the alternative, the order granting certiorari should be vacated as having been improvidently entered, and the petition for certiorari dismissed.

Respectfully submitted,

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